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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 302 of	)	CS Docket No. 96-46
the Telecommunications Act of 1996	)	
	)	
Open Video Systems	)	

To: The Commission

Comments of NYNEX Corporation

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Summary of Argument

The Commission has struggled for years to inject competition into the multichannel video market, yet its efforts have met with little success. Cable systems still dominate the provision of video service. There are very few markets where cable operators face competition from "overbuilding." Wireless cable and DBS have made only slight inroads. And, notwithstanding the vigorous efforts of the Commission and a number of carriers, video dialtone never got off the ground. As a result, both Congress and the Commission have been forced to wrestle with the thorny problems created by cable domination of the video markets; cable rate regulation and cable leased access requirements to name two, are measures adopted by Congress to protect program distributors and members of the public from abuses by dominant cable operators.

The historic Telecommunications Act of 1996 (the "Act") reflects Congress's preference for competition rather than regulation. It establishes as a national goal "opening all telecommunications markets to competition,"[1/] so that entrepreneurial initiative rather than government regulation can shape the communications services available across the nation. This approach is reflected in the statutory framework for OVS systems. The Act directs the Commission, in the clearest terms, to adopt streamlined regulation of open video service "in

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[1/] H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996).

lieu of, and not in addition to, the requirements of Title II."[2/] As if to underscore its intent, Congress repealed the Commission's video dialtone rules and policies.

Congress has thus emphatically rejected the rigid Title II approach that had chilled the introduction of video dialtone service. It recognized that local exchange carriers and others must be allowed maximum flexibility to structure their offerings in order to encourage them to enter the video distribution business and to maximize their chances of competing successfully with entrenched cable systems.

Consistent with the Act's general mandate that the Commission forbear from regulating whenever regulation is unnecessary to achieve the Act's goals,[3/] and the specific directive in Section 653 that the Commission eschew a Title II approach to regulating open video service, the Commission should approach its task in this proceeding with the greatest restraint. Open video systems are new services with no market share. No one yet has a firm or comprehensive picture of the technologies that will be used to deliver it, the services that will be provided, how it will be marketed, or the competitive factors that will affect its development. Moreover, the companies providing this service will be new entrants in the video market competing with entrenched cable companies that have established program supplier relationships and established customer bases. Open video systems are clearly a prime candidate for forbearance.

Accordingly, the Commission should afford open video operators maximum flexibility to design and price their offerings to "meet the unique competitive and consumer needs of

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[2/] Act, Section 653(c)(3).

[3/] See Communications Act of 1934, as amended, Section 10(a).

individual markets."[4/] It should adopt only those regulations that are essential to implement statutory requirements.

Thus, the Commission should:

- afford OVS operators maximum discretion to allocate and position channels, subject to the Act's nondiscrimination requirement.

- give OVS operators maximum flexibility with respect to the manner in which program providers are solicited, as long as the procedures employed are reasonably open to all interested participants, the criteria for participation are reasonable, and adequate public notice is given of the enrollment period and the participation requirements.

- afford OVS operators broad flexibility to design their systems, set prices for access, and impose reasonable qualifications requirements for video program providers including requirements of fair program access, provided its actions are based on *bona fide* business considerations and are not intended to discriminate against a particular entity. The OVS operator should not be required to provide capacity to the local cable operator if it determines that doing so could give the cable operator access to sensitive competitive information or otherwise undermine competition between the open video system and the incumbent local cable system.

- permit the OVS operators or its affiliates to market the programming services of unaffiliated providers along with the programming provided by the operator, with the consent of the unaffiliated provider.

- give OVS operators flexibility to determine whether to require the sharing of channels, to prescribe the terms and conditions for sharing channels, and to decide whether to delegate the administration of shared channels to a third party.

- apply the must-carry and retransmission consent rules to open video systems in the same manner as they apply to cable systems. The OVS operator should be responsible for assuring that system subscribers have access to the must-carry and PEG channels. Must-carry, and PEG channels should not be counted as channels "selected" by the OVS operator because it is required to carry them. As stated in the Act, only the PEG "channels" are required to be provided by the OVS operator, not the PEG facilities.

[4/] *Notice of Proposed Rulemaking* at ¶ 2.

- apply the syndicated exclusivity, network nonduplication and sports exclusivity rule to the entity which controls the programming. The OVS operator should also be responsible for compliance with syndicated exclusivity, network nonduplication and sports exclusivity requirements on the channels carrying broadcast station pursuant to the retransmission consent. With respect to programming on other channels, the entity providing the programs should be responsible for compliance with those rules.

- vigorously enforce its program access rules and extend those rules to all programming distributed by cable-affiliated entities, whether by satellite or terrestrial means.

- enforce the statutory requirement that the OVS operator not unreasonably discriminate in providing information to subscribers "for the purposes of selecting programming" as part of the general prohibition on discrimination. The statutory requirement should be interpreted as referring only to information provided on the on-screen programming menu that is used by the subscriber.

- establish a certification procedure that is swift, imposes minimal burdens on OVS operators, and does not give potential competitors or local governments a means to delay or block deployment of open video systems.

- leave OVS operators and their affiliates free to bundle and market OVS services together with telecommunications services in any way they believe is most likely to secure customers.

- adopt simple and expedited dispute resolution procedures that place both the burden of proceeding and the burden of proof on the complainant.

- make it clear that Congress has preempted state and local regulation of open video system, except to the extent that an OVS operator is required to pay fees pursuant to Section 653(c)(2)(B).

In short, to the maximum extent consistent with the Act, the Commission should avoid adopting complex rules and restrictions that may deter local exchange carriers from making the enormous investment and taking the considerable risks that will be required to compete with entrenched cable systems. The marketplace, not the government, should decide what this new service can become.

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Comments of NYNEX Corporation

NYNEX Corporation (NYNEX) submits these comments on the Commission's *Notice of Proposed Rule Making* ("Notice") in the above-captioned proceeding. The Notice proposes to adopt rules governing the construction and operation of open video systems (sometimes referred to herein as "OVS"). NYNEX is encouraged that the Commission recognizes the importance of minimizing the regulatory burdens imposed on this new and untested form of video programming distribution. As discussed more fully below, NYNEX urges the Commission to give OVS operators maximum flexibility to design their systems and offer video services in a manner responsive to the marketplace. Such an approach will further Congress' objective in enacting the Telecommunications Act of 1996 ("the Act")[1] that

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 1996 U.S.C.C.A.N. (110 Stat. 56). Citations herein to new sections of the Communications Act refer to sections of the Communications Act of 1934, as amended.

competition and entrepreneurial initiative, rather than governmental regulation, shape the telecommunications services offered to the American public.

I. The Commission Should Approach the Regulation of Open Video Systems With Restraint.

As it plans entering the competitive marketplace of multichannel video services, NYNEX is heartened that the Commission is approaching the task of implementing the OVS provisions of the Act cognizant of Congress's overriding goal of establishing:

> a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. . . .[2]

The OVS provisions of the Act are designed to replace the rigid common carrier framework established for the provision of video dialtone services -- a framework that chilled the introduction of those services. In place of that burdensome regulatory scheme, the Act directs the Commission, in the clearest terms, to adopt streamlined regulations of open video systems "in lieu of, and not in addition to, the requirements of Title II."[3] This statutory language is echoed in the Conference Report, which cautions that "[t]he conferees do not intend that the Commission impose title II-like regulation under the authority of this section."[4] And, as if to remove any vestigial doubt about its intentions, Congress repealed,

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[2] H.R. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996) ("Conference Report"); *see*, S. Rep. No. 23, 104th Cong., 1st Sess. 1 (1995).

[3] *See* Communications Act, Section 653(c)(3).

[4] Conference Report at 178.

effective immediately, all of the Commission's video dialtone rules and policies.[5] Congress could not have made its intent any plainer.

This rejection of a Title II approach reflects Congress recognition that, in order to induce local exchange carriers and others into the video distribution business, the Commission must wield a light regulatory hand, so that new entrants will have maximum freedom in structuring their offerings. And, while the Act imposes certain obligations on OVS operators and directs the Commission to adopt regulations implementing those requirements, it also authorizes the Commission to forbear from regulation where regulation is unnecessary to achieve Congress' objectives.[6] The Commission should exercise that discretion liberally so as to create as favorable a regulatory environment as possible for OVS entry.

Open video systems are a new frontier, and those considering entry face formidable obstacles. Open video systems have no market share and the contours of the services are largely undefined. No one yet has a firm or comprehensive picture of the technologies that will be used to deliver it, the services that will be provided, or the competitive factors that will affect its development. New technologies, such as switched video services and ADSL, among others, hold promise to increase the options available to customers and programmers, but their feasibility and marketability in the real world have yet to be tested.

Moreover, the companies providing this service must compete with entrenched competitors that have established program supplier relationships and established customer

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[5] Act, Section 302(b)(3). *See also* Notice at ¶¶ 74-76.

[6] *See* Communications Act, Section 10(a).

bases. As the Commission found in its *Second Annual Report on the Status of Competition in the Market for the Delivery of Video Programming*,[7] cable systems dominate the provision of video services[8] and have substantial relationships with most of the attractive program providers.[9] To date, there are few markets where a cable operator faces direct competition from "overbuilding," and wireless cable and DBS have made only small inroads.[10] Notwithstanding the vigorous efforts of the Commission and a number of carriers, video dialtone service never got off the ground. Today, VDT systems serve an infinitesimal number of subscribers and most carriers that explored the use of VDT have abandoned the effort.

Thus, to realize Congress' goal of injecting competition into the video market, the Commission must affirmatively *encourage* local exchange carriers and others to offer OVS services.[11] To do so, these new entrants must have maximum flexibility to employ technologies and system configurations and to structure and price their services in a way they believe is responsive to customer demand. Otherwise, there will be no incentive for telephone companies (or others) to make the enormous investment and take the considerable

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[7] FCC 95-491, released December 11, 1995 at ¶ 9. ("*Second Annual Report*").

[8] The Commission found that "cable subscribership continues to dwarf the combined subscribership of all other MVPDs," serving 61.7 out of a total of 67.5 million subscribers to MVPDs, and "[a]lthough market share is not dispositive evidence of market power, we cannot conclude that a competitive market currently exists for the delivery of video programming." *Id.* at ¶ 9.

[9] *Id.*

[10] *Id.*

[11] *See* Conference Report at 178.

risks that will be required to establish open video systems to compete with entrenched cable systems.

Accordingly, the Commission should allow the marketplace to determine, to the maximum extent feasible consistent with Congressional directives, the manner in which OVS services are offered. Following the same approach that it employed in implementing portions of the Cable Act in 1992, it should adopt only those regulations that are essential to implement statutory requirements.[12] Those regulations should not impose obligations that are more specific than the provisions in the Act and the Commission should rely on the dispute mechanisms to flesh out the specifics of the statutory requirements, much as it did with respect to the program access rules and the rules implementing Section 616 of the Communications Act.[13]

This approach will permit the Commission to resolve issues in the context of concrete, factual settings, rather than devising regulations based on conjectural harms. As OVS systems develop, the Commission can always augment its regulations if a concrete need to do so materializes. At this juncture, however, the Commission should adopt a minimal regulatory approach if it is to "encourage common carriers to deploy open video systems"[14] and promote "Congress' goals of flexible market entry, enhanced competition, streamlined

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[12] *See, Second Report and Order* in MM Docket No. 92-265, 9 FCC Rcd 2642 (1995).

[13] *Id.*

[14] Conference Report at 178.

regulation, diversity of programming choices, investment in infrastructure and technology, and increased consumer choice."[15]

II. Comments on Specific Commission Proposals.

As the Commission recognizes in the *Notice*, there are a number of different technologies that can be employed to provide OVS service and there is no consensus as to which technologies are superior. In all likelihood, different technologies may be deployed by different entities. NYNEX is currently evaluating the use of an integrated digital system capable of delivering voice, data, video and other services. These comments will focus primarily on the issues in the *Notice* that relate to such a system. However, it is critical that the Commission avoid adopting any regulation based on a given technology.

A. Allocating Channel Capacity.

The Commission tentatively concludes that "open video system operators should be permitted to administer the allocation of channel capacity. . . ."[16] Though it acknowledges that Congress has expressed its preference for reliance on market forces, the Commission nevertheless inquires whether specific rules are necessary to guide operators' discretion in making decisions regarding channel allocation and positioning in order to implement the statute's nondiscrimination requirement.[17]

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[15] Notice at ¶ 4.

[16] Notice at ¶ 11.

[17] *Id.*

The Commission's conclusion that OVS operators should be permitted to administer the allocation of channel capacity -- to design their service offerings -- is dictated by the statutory scheme. That scheme prohibits the Commission from regulating open video systems like passive common carrier systems, with the operator having no control over its service offerings. On the contrary, even when demand exceeds the system's capacity, the OVS operator and its affiliate is permitted to program up to one-third of their systems' capacity and must be able to "tailor services to meet the unique competitive and consumer needs of individual markets."[18] They clearly cannot design services tailored to consumer needs or competitive exigencies unless they are permitted to perform the basic function of administering the allocation of channel capacity.

NYNEX strongly opposes imposition of detailed rules constraining OVS operators' discretion to allocate or position channels. The overriding limitation on OVS operators' discretion to allocate capacity should be only the statute's nondiscrimination requirement. Thus, rather than impose detailed requirements that may hamper operators' flexibility, the Commission should adopt a broad directive reflecting the statutory nondiscrimination prohibition. When capacity constraints arise, the operator should be able to employ any nondiscriminatory procedure to allocate capacity. The three means suggested by the Commission -- first-come first-served, lottery and proportional allotment[19] -- should all qualify as nondiscriminatory allocation procedures. But the Commission should not attempt

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[18] *See* Conference Report at 177.

[19] *See* Notice at ¶ 24.

to designate the only acceptable means of allocating capacity. At this nascent stage of the service's development, it is impossible to predict all reasonable means of channel allocation and premature to hamper operators' flexibility by dictating the exclusive channel allocation methods.

To stimulate common carrier investment in OVS and increase the diversity of programming choices to consumers, the Commission must also give operators flexibility with respect to the manner in which participants are solicited as long as the procedure employed is reasonably open, the criteria for participation are reasonable, and adequate public notice is given of the enrollment period and the participation requirements. For example, where demand exceeds capacity, the OVS operator should be permitted to limit the capacity available to any one unaffiliated program provider to one-third of the system's capacity. The OVS operator or its affiliates are limited by Section 653(b)(1)(B) to that amount of capacity and giving an unaffiliated program provider more channels than the OVS operator or its affiliate -- would place the OVS operator or its affiliate at a distinct competitive disadvantage in marketing its programming. Consequently, OVS operators should have the right to place reasonable limits, even-handedly applied, on the number of channels available to a single program provider.

Once an open video system's initial configuration is established, the operator should not be required to alter that configuration or expand capacity to additional programmers until the beginning of the next enrollment period. As the Commission recognizes, there is a "strong public interest in establishing some level of certainty in providers' expectations with

respect to their ability to retain channel capacity once allocated, and in consumers' expectations of uninterrupted service."[20] While there is no magic length to the period between open enrollments, the Commission should not require operators to open up new periodic enrollments more frequently than every five years, although they should be free to do so if they wish.[21] A five-year period would afford the operator a reasonable business planning horizon to plan expansion of system facilities and would assure subscribers of a stable programming package.[22]

B. Nondiscrimination Requirement

While Section 653(b)(1)(A) prohibits OVS operators from "discriminating among video programming providers," that provision must not be construed to impair the OVS operator's ability to make reasonable business decisions concerning the operation of its open video system, even if some of those decisions may have a disparate impact on some program providers. As the Commission has noted, Section 653(b)(1)(A) is designed to assure that unaffiliated video programmers have "fair access to the open video system,"[23] and was not

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[20] Notice at ¶ 25.

[21] The Commission should not tie the terms of contracts between OVS operators and unaffiliated program suppliers to the open enrollment periods. Rather, OVS operators should be free to enter into contracts with unaffiliated program packages for as long or as short a period as the parties negotiate.

[22] The concept of periodic enrollment periods is a useful one even for switched digital open video systems. Although the switching capacity of such systems can be expanded, in effect, to permit carriage of a virtually unlimited amount of programming, such expansion must be planned in advance and will take time to implement. Periodic open enrollment periods every five years will permit the OVS operator to plan expansion of system capacity in a systematic way.

[23] Notice at ¶ 30.

intended to constrain the business judgment of the OVS operator. Indeed, it is clear that Congress intended that OVS operators "should be 'allowed to tailor services to meet the unique competitive and consumer needs of individual markets'."[24]

Consequently, the Commission should give OVS operators broad flexibility to design their systems, to set prices for access, and to impose reasonable requirements on those seeking access to the system, provided those actions are based on *bona fide* business considerations and are not intended to discriminate against a particular entity or program provider. Consistent with this approach, NYNEX supports the Commission's tentative conclusion that "Congress intended that some level of rate 'discrimination' would be acceptable, . . ." and urges the Commission to permit OVS operators to establish different access rates for different kinds of program services.[25] Thus, for example, different rates could apply to pay-per-view services, premium channels or part-time carriage. Similarly, discounts should be allowed for volume arrangements and for entities willing to make long-term commitments. As long as these criteria are based on objective criteria and permit program providers "fair access" to the open video system, they would satisfy the nondiscrimination requirement.

OVS operators should be permitted to establish other objective qualification requirements for program providers. These could include, among others, financial requirements; requirements that program providers indemnify the OVS operator with respect

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[24] Notice at ¶ 2.

[25] Notice at ¶ 32.

to copyright, defamation and similar claims; assurances concerning the program provider's right to distribute the programming; standards concerning the distribution of indecent programming or programming with excessive violence; interconnection and technical standards; and other nondiscriminatory requirements cable operators may employ for commercial leased access channels.[26] As indicated above, the test for determining whether these requirements are "unjustly or unreasonably discriminatory" should be whether they are based on valid business considerations and permit fair access by unaffiliated programmers. The validity of such a requirement should be resolved in the dispute resolution process rather than through rules adopted in advance.

The OVS operator should not be required, however, to provide capacity to the local cable operator, although it should be free to do so if it wishes.[27] The legislative history of the Act makes it very clear that Congress's goal is to "introduce vigorous competition in entertainment and information markets."[28] It would undercut that goal to force the OVS operator to provide capacity to its principal multichannel competitor -- the cable operator. Requiring the OVS operator should provide capacity to the local cable company and could also require that the OVS operator give the cable operator access to sensitive confidential information or permit the local cable company to undermine the competitiveness of the open

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[26] *See* 47 C.F.R. §§ 76.970 * 76.971 (1995).

[27] The introductory clause of the second sentence of Section 653(a) gives the Commission discretion to determine the extent to which a cable operator or any other person may provide programming through an open video system.

[28] Conference Report at 178.

video system by not cooperating with others using the system. Just as the Commission made an exception to its prohibition on restricting resale of cellular service by permitting one cellular carrier to refuse to permit its wireline or nonwireline competitor to use its facilities when the latter's system is fully operational,[29] so should the Commission permit OVS operators to refuse to provide capacity to the local cable operator.

OVS operators should also be permitted to preclude the use of the system for the distribution of programs or program series by an entity with exclusive rights to the program or favorable contract terms that effectively preclude others from distributing the program on that open video system. This will allow the OVS operator to protect its substantial investment in constructing an open video system by assuring effective intra-system competition. Cable operators and others may have the economic muscle to extract exclusive or very favorable arrangements with suppliers of programming that is essential to the viability of an OVS program package. As a result, those entities will have an unfair competitive advantage over the OVS operator or its affiliate who made the investment in constructing the system. In that respect, this proposal carries over to the OVS environment the provisions of Section 616 of the Act and levels the playing field.[30] While exclusive vertical arrangements may be pro-competitive in some circumstances, they can also be used, as the Commission

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[29] *See Petitions for Rulemaking Concerning Proposed Changes to the Commission's Cellular Resale Policies*, 7 FCC Rcd 4006 (1992).

[30] Section 616 required the Commission to adopt rules that, *inter alia*, are "designed to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly . . . " 47 U.S.C. §536(a)(3).

recognized in the *Second Annual Report*, to foreclose entry by new entities.[31] Permitting the OVS operator to adopt this condition will diminish the likelihood that entrenched cable operators will be able to hobble the OVS industry. Thus, it will promote investment in open video systems and enhance the attractiveness of program packages made available over those systems.

NYNEX opposes the Commission's proposal to require that contracts with video program providers be made publicly available.[32] Cable operators are not required to make public agreements that are subject to the program access requirements of Section 628 of the Communications Act.[33] If those agreements can be held in confidence, so too should agreements between OVS operators and unaffiliated program packagers taking capacity on the system. Requiring that these documents be made public would disclose sensitive competitive information and thus adversely affect the competitive posture of the OVS operator and the unaffiliated program providers vis-a-vis the local cable company.[34] If the Commission believes that pricing information should be made available, however, it should allow OVS

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[31] *Second Annual Report at ¶ 158.*

[32] Notice at ¶ 34.

[33] 47 U.S.C. § 548 (Supp. 1995).

[34] NYNEX recognizes, however, the terms of these agreements must be made available to the Commission in the event of a claim filed by a program distributor seeking to acquire capacity on the open video system.

operators to require a confidentiality agreement so that certain perfunctory information does not get in the hands of their competitors.[35]

C. Marketing Programming Services of Unaffiliated Providers

The Commission recognizes that the statute allows OVS operators and their affiliates to market the program services of unaffiliated program providers along with the programming provided by the operator.[36] Affording OVS operators and their affiliates that flexibility is clearly consistent with the thrust of the Act and will enhance the competitiveness of open video systems.

D. Shared Channels

NYNEX supports the Commission's proposal to give OVS operators flexibility to determine whether to require the sharing of channels and whether to delegate the administration of shared channels to a third party.[37] Those proposals are consistent with the deregulatory mandate of the Act and the requirement that OVS operators be given flexibility to structure their OVS systems and services.

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[35] In the situation involving the release of network interface information, the Commission allows AT&T and the Bell Operating Companies to condition disclosure of certain information on the execution of nondisclosure agreements. The Commission found that the use of nondisclosure agreements would promote network innovation while protecting the ability of enhanced service providers to compete. *See, e.g., Report and Order in CC Docket No. 85-229*, 2 FCC Rcd 3072, 3091 (1987).

[36] Notice at ¶ 27. The ability of the OVS operator or its affiliate to market the programming of unaffiliated program providers would be subject to the consent of the unaffiliated programmer.

[37] Notice at ¶ 37.

1. Terms and Conditions for Shared Channels.

Some of the other specific suggestions in the Notice concerning shared channels are more problematical -- especially the suggestion that the Commission adopt rules prescribing the terms and conditions for sharing channels.[38] Adopting such rules at this time, while OVS is still a concept and not a reality, is likely to stifle deployment of OVS and limit the creativity of those attempting to bring new OVS services to the marketplace. The OVS operator should have the discretion to decide whether any channels will be shared and, if so, which channels will be shared. There is nothing in the statute to suggest that an OVS operator's discretion to require channel-sharing should be circumscribed, other than by (1) the specific requirement that subscribers have "ready and immediate access" to programming on the shared channels and (2) the general requirement that OVS operators not discriminate among program providers. Moreover, there is very limited experience at this time with shared channels and no basis for determining the kinds of problems that might arise. Thus, there is no record on which the Commission can reasonably fashion rules governing channel sharing in specific situations.

2. "Ready and Immediate" Availability of Shared Channels

Similarly, there is no justification for adopting rules that define what constitutes "ready and immediate" access to shared channels, such as the requirement proposed by the Commission that access be "transparent" to the subscriber.[39] While it may be technically

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[38] Notice at ¶ 39.

[39] Notice at ¶ 40.

feasible to offer shared channels in a manner that is transparent to the subscriber, that is not the only manner in which shared service can be offered. Moreover, given the many different possible technologies that may be used to provide OVS service, imposing a specific requirement of transparency may inhibit deployment of certain kinds of systems. Therefore, rather than attempting to refine the statutory requirement, the Commission should simply require that customers have "ready and immediate" access to shared channels, in accordance with the Act.

E. Title VI Requirements

The Commission seeks comments on the manner in which the must-carry and retransmission consent rules, the obligation to provide access for PEG channels, and the sports exclusivity, network non-duplication and syndicated exclusivity rules should apply to open video systems.[40]

1. Compliance With Must-Carry, PEG, Network Nonduplication, Syndicated Exclusivity and Sports Exclusivity Requirements

The Commission solicits comments on a number of issues concerning the manner in which the must-carry, retransmission consent, PEG, network non-duplication, syndicated exclusivity and sports exclusivity rules should apply to open video systems.[41] In general, the must carry and retransmission consent provisions should be applied to open video systems in the same manner as they apply to cable operators serving the same area. For example, cable systems frequently serve multiple municipalities and often cross ADI or other must-

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[40] Notice at ¶ 46.

[41] Notice at ¶ 46.

carry boundaries. The Commission has an established body of law governing the application of these rules in those circumstances. The same body of law should apply to OVS operators, which can manage their systems in ways similar to cable systems.

Similarly, OVS operators should devote the same capacity to PEG channels as competitive cable operators and deal with the different PEG obligations that apply where the OVS system serves multiple municipalities in the same way as cable systems.[42] OVS operators should have the flexibility, however, to fulfill their PEG obligations in any of the ways outlined in paragraph 57 of the Notice.[43] Where there is no local cable operator, OVS operators should make a reasonable amount of capacity available for PEG purposes. The local municipality or franchise authority should be responsible for delivering program material for distribution on those channels and the OVS operator should be free to use the channels, if it wishes, for other programming when they are not employed for PEG purposes.

The Commission requests comment on which entity -- the OVS operator or unaffiliated programmers -- should be responsible for assuring that OVS subscribers have access to the PEG and must-carry channels and for assuring compliance with the network

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[42] The OVS operator's obligation to provide PEG capacity under the statute does not carry with it any obligation to provide studio facilities, personnel, funding or other commitments the local cable operator may have made in its franchise. Section 653(c)(1)(B) applies Section 611 to OVS operators and Section 611 only authorizes franchising authorities to require the dedication of cable channels, not the provision of facilities. Further support for this interpretation is found in the fact that Congress did not apply Section 624 to open video systems and services. That section allows franchise authorities to require cable operators to provide facilities in addition to PEG capacity.

[43] Where the local cable operator's PEG obligation changes as the result of the renewal of or renegotiation of the franchise, the OVS operator should not be required to increase its PEG channels until the next enrollment period opens.

nonduplication, syndicated exclusivity rules and sports exclusivity rules. Compliance with must-carry and PEG requirements is an inescapable part of the OVS operator's basic responsibility for allocating channel capacity. The Commission should give the OVS operator the flexibility, however, to determine whether to require, as a condition of access, that all unaffiliated program packagers offer at their expense those mandatory program services to their subscribers.

Similarly, the OVS operator or its affiliate should be responsible for assuring compliance with the network nonduplication protection, syndicated exclusivity and sports exclusivity rules with respect to channels the operator or its affiliate controls, including must-carry programs, retransmission consent programs and programs distributed on shared channels.[44] With respect to programs distributed by unaffiliated programmers, the unaffiliated programmer should be required to assure compliance.

2. Must Carry and PEG Channels Should Not Be Counted as Channels "Selected" By the Operator.

NYNEX supports the Commission's proposal not to count must-carry and PEG channels against the OVS operators' (or its affiliate) one-third channel limitation under Section 653(b)(2)(B) of the Communications Act.[45] Neither the OVS operator nor its affiliate has "selected" those program services; they are required by statute to carry them. Accordingly, those channels should not be counted against the OVS operator's or its

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[44] The notice requirements and other rules governing the manner in which these provisions are enforced would apply in the OVS context; and thus, the local broadcast station would be required to notify the OVS operator of its nonduplication and exclusivity requests.

[45] Notice at ¶ 19.